UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2343

September Term, 2013

ALVIN MALVEO

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Reed,
Sonner, Andrew L.
(Retired, Specially Assigned),

JJ.

Opinion by Sonner, J.

Filed: May 20, 2015

Convicted by a jury in the Circuit Court for Prince George's County of second degree assault, third degree burglary, and related offenses, appellant, Alvin Malveo, presents three questions, which we rephrase for clarity,[1] for our review:

I. Did the court abuse its discretion in sustaining the prosecutor's objection to trial counsel's comment during opening statement that Malveo's "liberty is at stake?"

II. Did the court err in admitting into evidence a recording of a call to 911?

III. Is the evidence sufficient to sustain the convictions?

Finding no abuse of discretion or error, we affirm the court's judgments.

Facts and Proceedings

In September 2012, Malveo was charged by indictment with first degree assault, first degree burglary, and related offenses. On March 20, 2013, Malveo appeared for trial. The following day, the court declared a mistrial.

On July 31, 2013, Malveo again appeared for trial. Following the close of the evidence, the jury indicated that they were "[u]nable to come to a unanimous decision." The court again declared a mistrial.

[1]Malveo's questions presented *verbatim* are:

1. Did the trial judge err in precluding defense counsel from stating in his opening argument that the Defendant's liberty was at stake in the trial?

2. Did the trial judge err in admitting the 911 tape into evidence under the present sense impression exception to the hearsay rule?

3. Was the jury verdict against the weight of the evidence?

On October 28, 2013, Malveo appeared a third time for trial. During opening statement, trial counsel stated, in pertinent part: "Ladies and gentlemen, this is a criminal case. The State of Maryland and the police department have a burden in this case, and that is to demonstrate that an assailant broke into the house and committed this crime, and they have to show you beyond a reasonable doubt that that was done by my client, Mr. Malveo."

Following opening statements, the State called Valerie Harlan, Malveo's former girlfriend and the mother of his daughter. Harlan testified that, in July 2012, she began a relationship with a man named Carlton McCombs. On August 8, 2012, McCombs took Harlan to her mother's house. That evening, Malveo called Harlan and told her that if she did not "get out of the relationship . . . , he was going to kill" her and McCombs. After McCombs took Harlan home, Harlan asked McCombs to stay with her because she "was scared." The two went into Harlan's bedroom and locked the door.

Approximately "15 or 20 minutes" later, Harlan "heard a truck pull up." Looking out her son's bedroom window, Harlan saw a white truck with "some red writing on" it, and recognized the truck as belonging to Malveo, as she knew "what truck he drives" and had "been in the truck before." After Harlan went "[b]ack to [her] room," she heard "knocking on the door" and a voice say: "Val, Val, open the door." Harlan recognized the voice as Malveo's. Harlan then "heard the truck pull off."

Approximately 5 to 10 minutes later, Harlan again heard "banging on the door" and a voice "[s]creaming [Harlan's] name." Harlan again recognized the voice as Malveo's.

After the person at the door "kicked the door off the hinges" and started "coming up the stairs," McCombs "got up and said that he had to go find him." Harlan went into the bathroom and locked the door.

While in the bathroom, Harlan heard "[a] lot of tossing and fighting" and her "daughter's dollhouse being thrown around." Harlan "[p]icked up the phone," called 911, and spoke to an operator. When McCombs "came back into the bathroom," Harlan saw that "[h]e was bleeding real bad." After Harlan "tried to stop the bleeding," she and McCombs went into the bedroom until police arrived.

The State also called McCombs, who testified that, after Harlan "went in the bathroom," he "went in the hallway" and "met up" with the person who had "broken in." McCombs, who was not "able to see anything about th[e] person," fought the person until the person "stabbed [McCombs] in the side with something." As the person ran "down the steps," McCombs "picked up [a] dollhouse and threw it at" the person. Later, an "ambulance person" told McCombs that he "ha[d] a collapsed lung."

During closing argument, trial counsel stated, in pertinent part:

> Ladies and gentlemen, when I started this case, I told you that this was a case where the State and the police are prosecuting my client. They have the burden of proof. They have to demonstrate beyond a reasonable doubt that he committed the first degree offenses of assault and burglary that the State is alleging. That hasn't changed.
>
> The [c]ourt instructed you, these are not words that we just write down and say casually. What we say is, we have a system here that requires the State in a criminal case to prove its case. Not to claim it, not to allege it, but to bring

> in proof that doesn't think it might have happened, doesn't say that it probably happened, but says that beyond a reasonable doubt, I'm certain as to what happened in this case.

During deliberations, the jury sent to the court a note in which they asked: "If we can not [sic] come up with a unanimous verdict[,] what is the next step or outcome[?]" The court ordered the jury to "resume . . . deliberations."

The following day, the jury sent to the court a note in which they asked: "What is the definition of a crime[?]" The court responded: "You have the definition of the laws that are at issue in this case. Please refer to your jury instructions." The jury subsequently acquitted Malveo of first degree assault and first degree burglary, but convicted him of the remaining offenses.

Discussion

I.

During opening statement, trial counsel stated: "The State of Maryland, the prosecutor and the police are charging my client with first degree assault and first degree burglary." Later, trial counsel stated: "As they have charged [Malveo] with this serious criminal conduct, where his liberty is at stake, as it is in any criminal case." The prosecutor objected to the comment, and the court sustained the objection.

After trial counsel concluded opening statement, the parties approached the bench, and the following colloquy occurred:

[TRIAL COUNSEL]: The [c]ourt sustained an objection when I said the reason that the burden of proof is high in a criminal case –

THE COURT: You talked about his liberty.

[TRIAL COUNSEL]: The reason that burden of proof is so high in a criminal case is because it involves the liberty interest of the defendant. That is a correct statement of law.

THE COURT: Yes, it is, but I don't believe any point should have been arguing to a jury or indicating to a jury as to what the penalty is going to be, whether it's going to be probation or jail time, or what it's going to be. I don't believe any type of incarceration should decide this case, decide this case because incarceration is at issue. I think that's improper argument. It's a correct statement of the law, but it's a poor argument.

[TRIAL COUNSEL]: Well, I would say the link was not that the jury was going to be worried as to what was happening. It's the reason why we handle a criminal case so differently and so sacrosanctly. And it is because in this type of case, liberty interest is involved.

And by the [c]ourt sustaining the objection, it gave the impression, one, that I am misstating the law; and two, I think it is wrong that there is no linkage in there that I was threatening if you convict my client, he's going to go to jail.

THE COURT: Your argument is noted for the record.

Malveo contends that the court abused its discretion in sustaining the prosecutor's objection. He claims that trial counsel "had every right to ensure that the jury was aware of the significant impact that its decision would have upon Malveo," and "[b]y cutting off [trial] counsel's discussion of that topic, the trial judge unfairly limited the legitimate scope of [trial] counsel's argument."

The seminal case on the freedom of speech allowed for counsel during argument is *Wilhelm v. State*, 272 Md. 404 (1974). In *Wilhelm*, the Court of Appeals stated:

> While arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel, generally speaking, liberal freedom of speech should be allowed. There are no hard-and-fast limitations within which the argument of earnest counsel must be confined – no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.
>
> As a limitation upon the general scope of permissible . . . argument[,] counsel should not be permitted by the court, over proper objection, to state and comment upon facts not in evidence or to state what he could have proven. Persistence in such course of conduct may furnish good grounds for a new trial. The conduct of the trial must of necessity rest largely in the control and discretion of the presiding judge and an appellate court should in no case interfere with that judgment unless there has been an abuse of discretion by the trial judge of a character likely to have injured the complaining party.

Id. at 413 (citations and italics omitted).

The Court then commented on the freedom allowed for counsel during opening statement:

> Although the purpose of an opening statement is to apprise, with reasonable succinctness, the trier of facts of the questions involved and what is expected to be proven, such opening statement does not need to be limited to a factual recitation of what is expected to be elicited from the prospective witnesses. Counsel are entitled to make what rhetoricians call an exordium – that part of the opening intended to make the listeners heed you and to prepare them for that which is to follow.

Id. at 437-38 (footnote omitted).

In his concurring and dissenting opinion in *Davis v. State*, 22 S.W.3d 8 (Tex. App. – Houston [14th Dist.] 2000), Justice Wittig of the Court of Appeals of Texas expounded upon the permissible content of an exordium:

> In the opening statement the advocate completes the limited introductions of voir dire and states the logic of his position. Counsel outlines the theme of her case, discusses legal concepts and applicable principles such as burden of proof, presumption of innocence, and reasonable doubt. Rather than presenting the prosecution or defense in a kaleidoscope fashion, by bits and pieces, the opening statement is the first opportunity to present the whole picture in a logical sequence. . . . The issues may be simplified, narrowed, and presents a shortcut to educating jurors. The advocate disabuses the jury of false issues raised by her opponent or existing in the conventional wisdom. As a professional communicator, the advocate may not always fire the "magic bullet" insuring victory in this opening salvo, but at least he can take a shot at the minds and hearts of the jurors, and not be muzzled by the court. . . .
>
> The opening statement represents an indispensible one third of an effective trial lawyer's opportunity to advocate his client's case directly to the jury. . . .
>
> Discussing the significance of evidence and important issues gives the remainder of the advocate's case focus, meaning and content. The contextual opening, like a topic sentence, introduces, illuminates and sets the stage. The opening "hooks" the jury, thus to catch their interest and predispose them to counsel's case. This exordium works to make the listener take heed and prepare them for what will follow.

Id. at 16-17 (footnotes omitted).

We have not yet reviewed whether the freedom of counsel to catch the jury's interest and predispose them to counsel's case allows counsel to comment on whether a defendant's "liberty is at stake." However, the Missouri Court of Appeals, Eastern District, reviewed this question, in the context of closing argument, in *State v. Jones*, 398 S.W.3d 518 (Mo. Ct. App.

2013). Jones was "charged . . . with . . . first-degree assault and armed criminal action." *Id.* at 521. At trial, "[b]oth Jones and [the victim] testified as to their different versions of the physical altercation." *Id.* "Prior to closing argument, the trial court granted a motion in limine by [the] State prohibiting Jones from mentioning during his closing argument that Jones's 'liberty' was at stake." *Id.* The court "allowed Jones to argue to the jury that the outcome of their decision could have significant and long-term effects on him." *Id.* at 522. The jury subsequently convicted Jones of the offenses. *Id.* at 521.

On appeal, Jones contended "that the trial court committed prejudicial error in prohibiting him from arguing to the jury during his closing argument that the jury's decision would affect his liberty." *Id.* Finding error, the Missouri Court of Appeals stated:

> We are not persuaded that the concept of liberty is an irrelevant issue for consideration by a jury during the guilt phase of their deliberation. Liberty is the most basic and fundamental right guaranteed to citizens of our country by the United States Constitution. . . . Here, Jones's liberty is implicated not solely by the length of sentence, but also by the fact of conviction. The existence of a criminal conviction may adversely affect an individual's ability to obtain employment, creates a stigma associated with being found guilty of a criminal offense, and generates other collateral consequences not produced directly by the sentence rendered by the trial court or recommended by the jury. These effects arise from the nature of conviction of a criminal act, not as *de jure* punishment.
>
> * * *
>
> . . . Setting aside the narrow distinction between the prohibited and allowed content of Jones's closing argument, we reject any suggestion of a broad prohibition against using the word "liberty" by criminal defendants in their closing argument. Accordingly, Jones was entitled to argue to the jury,

> that they should be mindful of the effect their decision would have on his liberty. The trial court erred in prohibiting this argument.

Id. at 522-23 (citations omitted).

We agree with the Court that the concept of liberty is a relevant issue for consideration by the jury during the guilt phase of their deliberation. Like Jones's liberty, Malveo's liberty was implicated not only by the length of sentence, but also by the fact of conviction. Although the distinction between the prohibited content of trial counsel's argument and his argument made without objection is narrow, trial counsel was entitled to argue to the jury that they should be mindful of the effect their decision would have on Malveo's liberty. Hence, the court abused its discretion in sustaining the prosecutor's objection to this argument.

We have an additional reason for concluding that the court abused its discretion: because the possibility that Malveo might be incarcerated following conviction was a matter of common knowledge. The *Wilhelm* Court discussed whether counsel may argue matters of common knowledge:

> Although it is fundamental that the argument of counsel should at all times be confined to the questions in issue and the evidence relating thereto adduced at the trial and such inferences, deductions and analogies as can reasonably and properly be drawn therefrom, it is proper for counsel to argue to the jury – even though evidence of such facts has not been formally introduced – matters of common knowledge or matters of which the court can take judicial notice.
>
> * * *

> Jurors may be reminded of what everyone else knows, and they may act upon and take notice of those facts which are of such general notoriety as to be matters of common knowledge.

Id. at 438-39 (citations omitted).

Here, the possibility that a defendant, following conviction of a felony such as first degree assault or first degree burglary, may be incarcerated is a fact of such general notoriety as to be a matter of common knowledge. Even if that fact was not a matter of common knowledge, a court may take judicial notice that the potential punishment for those felonies includes incarceration. Hence, trial counsel was entitled to argue the matter to the jury, and the court should not have sustained the objection.

Our analysis does not end there, however. The Court of Appeals has stated that "[a]n appellate court does not reverse a conviction based on a trial court's . . . abuse of discretion where the appellate court is satisfied beyond a reasonable doubt that the . . . abuse of discretion did not influence the verdict to the defendant's detriment." *Hall v. State*, 437 Md. 534, 540-41 (2014) (internal citations, quotations, and brackets omitted).

In *Jones*, the Court found "no evidence in the record that any prejudice resulted from the trial court's error." 398 S.W.3d at 523. The Court stated:

> The jury was presented with two significantly different versions of the facts relating to the assault on [the victim]. The jury believed the testimony of [the victim] over the version of events portrayed by Jones. We are not persuaded that the jury would likely have altered this factual determination had Jones been allowed to argue in closing argument that his liberty was at stake. Moreover, as already noted, the trial court permitted Jones to argue, and Jones did argue to the jury, that its decision would have significant and long-lasting

> consequences on him. Although Jones was denied his right to use the word "liberty," the trial court permitted Jones to emphasize to the jury that its decision would have significant consequences for him. The terms Jones was permitted to use aptly describe for the jury the impact their verdict could have upon Jones.
>
> Given the clear determination of witness credibility by the jury, and the language Jones was permitted to use during closing argument, we reject any suggestion that the jury would have acquitted Jones but for the trial court's prohibition of the use of the word "liberty" during Jones's closing argument. Because the trial court's error did not result in prejudice to Jones, we deny this point on appeal.

Id. at 523-24.

We reach a similar conclusion here. The verdict reflects that the jury believed Harlan's testimony, and we are not persuaded that the jury would have altered this belief had the court overruled the prosecutor's objection to trial counsel's argument. During both opening statement and closing argument, moreover, trial counsel told the jury, without objection, that "the State and the police [were] prosecuting" Malveo for "serious criminal conduct," and that the State was required to prove its case beyond a reasonable doubt. These terms aptly described for the jury the impact their verdict could have upon Malveo. Given the jury's determination of Harlan's credibility, and the language trial counsel used during opening statement and closing argument, we do not believe that the jury would have acquitted Malveo but for the court's limiting of opening statement.

Malveo contends that the abuse of discretion was prejudicial for two reasons. First, he claims that the "difficulty" encountered by the jury in reaching a unanimous verdict, and

the inability of the jury at the July 2012 trial to reach a unanimous verdict, show that the State's case was "extremely weak." We disagree. As we stated earlier, the verdict reflects that the jury believed Harlan's testimony, and we have stated that "the testimony of even a single eyewitness, if believed, is sufficient evidence to support a conviction." *Marlin v. State*, 192 Md. App. 134, 153 (2010) (citations and footnote omitted). Also, the jury's verdict of not guilty of first degree assault and first degree burglary, but guilty of second degree assault and third degree burglary, indicates that the reason for the delay in reaching a verdict was not dispute as to Harlan's credibility, but determination of the appropriate offense. Finally, the record does not contain the testimony presented by the State at the July 2012 trial, and hence, we are unable to review the strength of that testimony.

Second, Malveo claims that the jury's request for the definition of a crime "clearly indicated that the jury was confused in some way about whether Malveo did in fact face some deprivation of liberty that was dependent on the jury verdict." But, as we stated earlier, the possibility that Malveo faced deprivation of liberty depending on the verdict was a matter of common knowledge. Also, we think that, if the jury was confused as to whether Malveo would be incarcerated following conviction, they would have asked the court whether Malveo would be incarcerated following conviction, not for the definition of a crime. We are satisfied beyond a reasonable doubt that the court's abuse of discretion did not influence the verdict to Malveo's detriment.

II.

During trial, the State offered into evidence a recording of Harlan's call to 911. The parties approached the bench, and the following colloquy occurred:

> [TRIAL COUNSEL]: I object to the admission of and playing of [the recording].
>
> * * *
>
> [The] recording . . . in this case is from the complaining witness while she is making statements of things that she cannot observe. So the first basis –
>
> THE COURT: You mean visually observe?
>
> [TRIAL COUNSEL:] Visually. And my first basis is the competence of the testimony. And I have analogized it to someone drawing conclusions based on sound and assumptions that they're making. If someone heard an accident outside and called in to 911, we view that as incompetent because of the basis of it.
>
> Well, in this particular case, you hear, "Alvin, stop that fighting." She has no idea at the time. And the listening – assuming that she does not have a personal basis other than her ears. So it has a misleading effect.
>
> The second thing I had brought to the [c]ourt's attention is the length of the audiotape. I don't remember, but I think it's about – do you remember? And at a certain point, even though the events are still fresh, the prejudicial value is her concern for the injured boyfriend, who she is caring for, and that there is not significant probative value being added.
>
> The third element is this is an out-of-court statement. So it qualifies as hearsay. Clearly, the declarant is present. That doesn't make it non-hearsay.
>
> THE COURT: I agree with you.

[TRIAL COUNSEL]: Then we look at the basis for why it's being offered. An excited utterance. And you have to go through this weighing what we talked about before. The mere fact that of what we had here certainly takes away confrontation issues, but it doesn't make it automatically admissible.

THE COURT: Nobody said anything about being admissible.

* * *

[] It doesn't matter that the declarant is here.

* * *

[] Whether or not the declarant was present. I would say it's an out-of-court statement. It's nothing to do with whether the declarant is available or unavailable.

* * *

[TRIAL COUNSEL:] As to the fact that we have hearsay, that this out-of-court statement is more prejudicial at some point after five minutes or so.

So I object to anything after the five-minute mark as just being more prejudicial. Otherwise, I would submit –

THE COURT: With respect to the hearsay argument – I think there was more than one articulated before, present sense impression.[2] . . .

[TRIAL COUNSEL]: You did allow it as a present sense impression if the [c]ourt's decision goes beyond mere visual observations, auditory observations.

THE COURT: Secondly, the [c]ourt has probative versus prejudicial analysis. With respect to the prejudicial in terms of a length of five minutes

[2]Rule 5-803 states that a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter," is "not excluded by the hearsay rule, even though the declarant is available as a witness[.]"

> is any less prejudicial than 17 minutes. So I believe the probative value of the jury fact finder hearing what was the taking place and what auditory observations that were made by the witness, I think all of that is extremely important.
>
> What was the very first argument that you made?
>
> [TRIAL COUNSEL]: It was the one that goes to there are conclusions being drawn by what she is hearing. She is attempting to characterize on the 911 tape what she believes happened.
>
> THE COURT: To me, that doesn't go to the admissibility. It's up to the fact finder.
>
> So your motion is denied on those grounds.

The State then played the recording for the jury. During the call, Harlan stated: "Alvin, what are y'all doing?" Harlan then told the 911 operator that her "friend and . . . old boyfriend" were "fighting," and that "the suspect's" name was Alvin Malveo.

Malveo contends that the court erred in admitting the recording, because Harlan "was merely making unsubstantiated assumptions in identifying Malveo as the intruder." In *Booth v. State*, 306 Md. 313 (1986), the Court of Appeals "consider[ed] the extent to which there must be proof that the declarant is speaking from personal knowledge before [a] statement may be admitted." *Id.* at 324. The Court stated:

> Although the declarant need not have been a participant in the perceived event, it is clear that the declarant must speak from personal knowledge, *i.e.*, the declarant's own sensory perceptions. The more difficult question involves the quantity and quality of evidence required to demonstrate the existence of the requisite personal knowledge. We conclude that in some instances the content of the statement may itself be sufficient to demonstrate that it is more likely than not the product of personal perception, and in other instances extrinsic

> evidence may be required to satisfy this threshold requirement of admissibility. . . . When the statement itself, or other circumstantial evidence demonstrates the percipiency of a declarant, whether identified or unidentified, this condition of competency is met.

Id. at 324-25 (footnote omitted).

Here, Harlan testified that, prior to the assault, she saw Malveo's truck pull up to her residence and heard Malveo's voice screaming her name and ordering her to open her door. While in the bathroom, Harlan heard what she identified as "tossing and fighting," and an item that she identified as her "daughter's dollhouse being thrown around." This evidence demonstrates Harlan's percipiency at the time of her call to 911, and hence, the court did not err in admitting the recording of the call.

III.

Malveo contends that the evidence was insufficient to sustain the convictions. The Court of Appeals has stated that, when an appellant challenges the sufficiency of the evidence, we must "determine whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the [appellant's] guilt of the offenses charged beyond a reasonable doubt." *State v. Smith*, 374 Md. 527, 534 (2003) (internal citation and quotations omitted).

Here, Harlan testified that, prior to the burglary of her residence and assault of McCombs, Malveo threatened to kill her and McCombs. Later that day, she saw a truck that she recognized as belonging to Malveo pull up to her residence, and heard a voice that she

recognized as belonging to Malveo scream her name and order her to open her door. We conclude that this evidence could convince a rational trier of fact beyond a reasonable doubt that Malveo subsequently burglarized Harlan's residence and assaulted McCombs.

Malveo contends that, for various reasons,[3] Harlan's testimony "was plainly not worthy of belief." But, the Court of Appeals has stated that "[w]eighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder," and "[w]e give due regard to the fact finder's findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *Id*. at 533-34 (internal citations, quotations, and brackets omitted). Here, the jury

[3]Malveo states:

> As the record shows, Harlan and McCombs initially told police on August 9, 2012 that they were awakened when they heard the door of the house being broken. At that time, they never said anything about a truck or that either of them had gotten out of bed and looked out a window. In addition, Harlan never mentioned any truck in her call to the 911 dispatcher, despite the fact that such identifying information is exactly what a police investigator would want to know. Moreover, there was never any statement by Harlan on August 9, 2012 that Malveo had called her and threatened her. The fact that no threatening call took place is established by the additional evidence that the police were never able to corroborate Harlan's claim about the call through her phone records. The falsity of Harlan's claim is also established by the circumstances of McComb's [sic] testimony from the March 2012 trial, when he said that he had never even heard Malveo's name at the time that the break-in took place on August 9, 2012.

had the opportunity to observe Harlan and find her testimony credible, and we give due regard to the jury's determination of her credibility.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.